

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



74-1122

To be argued by  
Robert M. Peet

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
H. G. SKIDMORE,

Plaintiff-Appellant,

-against-

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION,

Defendant-Appellee,

-and-

GEORGE P. BAKER, RICHARD C. BOND and  
JERVIS LANGDON, JR., as Trustees of  
the Property of PENN CENTRAL TRANS-  
PORTATION COMPANY, DEBTOR,

Intervening Defendants-Appellees.  
-----x

DOCKET NO.  
74-1122  
1/10

BRIEF FOR INTERVENING DEFENDANTS-APPELLEES  
GEORGE P. BAKER, RICHARD C. BOND and  
JERVIS LANGDON, JR. as Trustees of the  
Property of PENN CENTRAL TRANSPORTATION  
COMPANY, DEBTOR



ROBERT M. PEET  
Attorney for Intervening  
Defendants-Appellees  
Office & P.O. Address  
466 Lexington Avenue  
New York, New York 10017  
Tel. No. 340-2504

## TABLE OF CONTENTS

	Page
Issue Presented for Review .....	1
Statement .....	2
Facts	
(a) .....	3
(b) .....	5
Argument .....	6
I - The Awards of the NRAB are Final and Binding .....	6
II - Skidmore Has Failed to Establish Any of the Limited Grounds for Review Stated in the Railway Labor Act .....	8
Conclusion .....	12

# TABLE OF AUTHORITIES

Cases:	Page
<u>Albany Welfare Rights Org. Day Care</u> <u>Ctr. v. Schreck</u> , 463 F. 2d 620 (2d Cir. 1972) .....	11
<u>Andrews v. Louisville &amp; Nashville RR</u> , 406 U.S. 320, 325 (1972) - dictum .....	9
<u>Barrett v. Manufacturers Railway Co.</u> , <u>et al</u> , 326 F. Supp. 639 (E.D. Mo. 1971) .....	7, 8, 10
<u>Barrett, Edward J. v. Manufacturers</u> <u>Railway Co., et al</u> , 453 F. 2d 1305 (1972) .....	8
<u>Brotherhood of Rail. Signal. v. Chicago</u> , <u>M., St. P. and P. R. Co.</u> , 444 F. 2d 1270 (7th Cir. 1971) .....	10
<u>Brotherhood of Rail. Train. v. Central</u> <u>of Ga. Ry. Co.</u> , 415 F. 2d 403 (5th Cir. 1969) .....	9
<u>Brotherhood of Rail. Train. v. Chicago</u> <u>R. &amp; I. R. Co.</u> , 353 U.S. 30 (1957) .....	11
<u>Brotherhood of Rail. Train. v. Denver</u> <u>and R. G. W. R. Co.</u> , 370 F. 2d 833 (10th Cir. 1967) cert. den. 386 U.S. 1018 .....	7, 10
<u>Charleston &amp; Western Carolina Ry. Co.</u> <u>v. Thompson</u> , 234 U.S. 576, 577-8 (1914) .....	12
<u>Curtis v. Everette</u> , 489 F. 2d 516 (3rd Cir. 1973) .....	11
<u>Edwards v. St. Louis-San Francisco</u> <u>RR Co.</u> , 361 F. 2d 946 (7th Cir. 1966) .....	9
<u>Francis v. Southern Pacific Co.</u> , 333 U.S. 445, 448-50 (1948) .....	12
<u>Gunther v. San Diego &amp; Eastern Ry.</u> , 382 U.S. 257 (1965) .....	7

	Page
<u>Johnston v. Interstate Railroad,</u> 345 F. Supp. 1082 (W.D. Va. 1972) .....	9
<u>Kemp v. A., T. &amp; S.F. Ry. Co.,</u> 358 F. 2d 722 (5th Cir. 1966) .....	9
<u>McDonald v. Penn Central Transportation</u> <u>Co.,</u> 337 F. Supp. 803 (D.C. Mass. 1972) .....	9
<u>Rittle v. REA Express,</u> 367 F. 2d 578 (5th Cir. 1966) .....	7
<u>Segal v. Gordon,</u> 467 F. 2d 602 (2d Cir. 1972) .....	11
<u>Southern Pacific Company v. Wilson,</u> 378 F. 2d 533 (5th Cir. 1967) .....	7, 10
<u>Spade v. Chesapeake and Ohio Railway</u> <u>Co.,</u> 325 F. Supp. 1079 (D.C. Md. 1971) .....	10
<u>Union Pacific R.R. v. Price,</u> 360 U.S. 601 (1959) .....	7

Statutes:

Railway Labor Act

Section 3 First (i) .....	6
Section 3 First (m) .....	7, 9
Section 3 First (p) .....	9
Section 3 First (q) .....	8, 9, 10, 11

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
H. G. SKIDMORE,

Plaintiff-Appellant, :

-against- :

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION, :

DOCKET NO.  
74-1122

Defendant-Appellee, :

-and- :

GEORGE P. BAKER, RICHARD C. BOND and  
JERVIS LANGDON, JR., as Trustee of  
the Property of PENN CENTRAL TRANS-  
PORTATION COMPANY, DEBTOR, :

Intervening Defendants-Appellees.  
-----x

BRIEF FOR INTERVENING DEFENDANTS-APPELLEES  
GEORGE P. BAKER, RICHARD C. BOND and  
JERVIS LANGDON, JR. as Trustees of the  
Property of PENN CENTRAL TRANSPORTATION  
COMPANY, DEBTOR

ISSUE PRESENTED FOR REVIEW

Should the trial court's dismissal of the complaints seeking review of two awards of the National Railroad Adjustment Board which rejected H. G. Skidmore's claims be affirmed where the awards complied with the Railway Labor Act, involved no corruption or fraud, were within the scope of its jurisdiction, and were not baseless or without reason?

STATEMENT

Plaintiff-Appellant H. G. Skidmore (hereinafter referred to as "Skidmore") originally brought two separate claims to the National Railroad Adjustment Board (hereinafter referred to as "NRAB"), which denied relief in each proceeding. (I-2, II-16)\* Skidmore then commenced two actions in the United States District Court for the Eastern District of New York, seeking to have these two awards reviewed and set aside. (I-1, II-1).

Defendant NRAB is a purely nominal party and has taken and will take no part in the proceedings. See its letter of March 1, 1974 to the Clerk of this Court (no page) and of October 1, 1973 to the trial court (I-9).

Intervening defendants George P. Baker, Richard C. Bond and Jervis Langdon, Jr., as Trustees of the Property of Penn Central Transportation Company, Debtor (hereinafter referred to as "Trustees") were orally granted the right to intervene, as the real parties in interest. The two cases were assigned to Judge Weinstein, who held a hearing on the Trustees' motions to dismiss the complaints.

At the hearing on the motions, Skidmore was orally authorized to offer evidence and to amend his complaints

---

\*Roman numeral I refers to 73 Civ. 717 and II to 73 Civ. 901 and the arabic numerals refer to pages in each record.

to allege that the NRAB had acted fraudulently, which he later did (I-13), without any factual allegations to support his bare legal conclusion. Still later, Judge Weinstein in a memorandum order dated and filed November 7, 1973 granted the Trustees' motions as to both complaints on the ground that he lacked authority to grant relief. (I-10).

It is from this order of dismissal that Skidmore appeals. His notice of appeal, dated December 27, 1973, was filed on December 28th and was received by the Trustees on December 31st (I-12). His appellate brief and appendix were filed on April 1, 1974 and were received by the Trustees on April 2nd.

#### FACTS

##### (a)

The first claim made by Skidmore before NRAB by notice dated April 28, 1971 (I-15) was given Docket Number MS 19476. This resulted on January 10, 1973 in Award Number 19554, denying his claim (I-2). The action in the federal court to review this award was filed on May 21, 1973 and was given Docket Number 73 Civ. 717 (I-1).

In this case, NRAB denied Skidmore's claim that the Trustees had violated his rights as to vacation time

under a collective bargaining agreement known as the Vacation Agreement, and declared that any claim he might have under the Merger Protective Agreement must in accordance with its provisions be submitted to arbitration (I-2).

Skidmore originally was employed as a clerk in the ticket office of The New York Central Railroad Company in New York City. On May 20, 1964 a Merger Protective Agreement was entered into between his employer and the Pennsylvania Railroad Company setting forth certain rights of the employees of the two companies after merger, which took place on February 1, 1968. Subsequent to the merger, Skidmore was transferred to Penn Station in New York City, where the practices with respect to vacations, pursuant to his union's collective bargaining agreement known as the Vacation Agreement, were different from what Skidmore had had prior to merger at Grand Central Terminal pursuant to The New York Central Railroad Company's collective bargaining agreement. Under the post-merger agreement, vacations began on Saturdays regardless of when an employee's last weekly rest day occurred. Under the pre-merger agreement, vacations began after an em-

ployee's last weekly rest day. For full details see Carrier's submission to NRAB (I-21 to 31, 41-45).

(b)

The second claim made by Skidmore before NRAB by notice dated July 28, 1971 (II-1) was given Docket Number MS 19575. This resulted on October 30, 1972 in Award Number 19454, denying his claim (II-16). The action in the federal court to review this award was filed on June 21, 1973, and was given Docket Number 73 Civ. 901 (II-1).

In this case, NRAB denied, as not properly before it, Skidmore's claim seeking restoration of certain pass privileges on intercity passenger trains lost after the National Railroad Passenger Corporation (hereinafter referred to as "Amtrak") assumed responsibility for the operation of the Trustees' intercity passenger trains on May 1, 1971 and thereafter established more stringent pass privileges than had been in effect before with respect to employees.

The matter of pass privileges was nowhere referred to in the Merger Protective Agreement or in any collective bargaining agreement simply because in the railroad industry pass privileges have never been a subject of labor

negotiations but have been treated as gratuities which railroad employers could issue to their employees on any terms they saw fit to prescribe.

Starting May 1, 1971, Amtrak took over the issuance of employee passes from the Trustees, and established the pass policies of which Skidmore complained. Subsequently Amtrak modified its initial pass policies so as to make Skidmore's objections moot for all practical purposes (II-78).

For full details see Carrier's submission to NRAB (II-47 to 61, 77 to 79).

#### ARGUMENT

Skidmore's two claims involve the same legal issues, and will be discussed together. Nowhere in Skidmore's briefs are these issues argued.

#### POINT I

##### THE AWARDS OF THE NRAB ARE FINAL AND BINDING

Section 3 First (i) of the Railway Labor Act, 45 U.S.C. §153 First (i), provides that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" are to be handled by the NRAB.

This is the kind of dispute in the case at bar.

Awards of the NRAB are final and binding upon the parties. This is clearly set forth in Section 3 First (m) of the Railway Labor Act, 45 U.S.C. §153 First (m), which, as here pertinent, states:

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the award shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute." (Emphasis supplied.)

This principle is well settled under applicable case law. Union Pacific R.R. v. Price, 360 U.S. 601 (1959); Gunther v. San Diego & Eastern Ry., 382 U.S. 257 (1965); Barrett v. Manufacturers Railway Co., et al, 326 F. Supp. 639 (E.D. Mo. 1971). See also: Southern Pacific Company v. Wilson, 378 F. 2d 533 (5th Cir. 1967); Brotherhood of Rail. Train. v. Denver and R. G. W. R. Co., 370 F. 2d 833 (10th Cir. 1967) cert. den. 386 U.S. 1018; Rittle v. REA Express, 367 F. 2d 578 (5th Cir. 1966).

In the Price case the Supreme Court held that awards of the NRAB dismissing claims are not subject to further court review and that its decisions may not be relitigated in the courts but are final and binding. In Gunther, the same holding was made with respect to sustaining any awards which cannot be said "to be wholly baseless and

completely without reason", p. 261.

These holdings indicate the final and binding character of NRAB awards.

In Barrett v. Manufacturers Railway Co., et al, supra, the court held that a dismissal award was final and not subject to review and that failure of plaintiff's union to represent him properly was no ground for court review. This case was recently affirmed by the United States Court of Appeals, Eighth Circuit, Edward J. Barrett v. Manufacturers Railway Co. et al, 453 F. 2d 1305 (1972).

#### POINT II

#### SKIDMORE HAS FAILED TO ESTABLISH ANY OF THE LIMITED GROUNDS FOR REVIEW STATED IN THE RAILWAY LABOR ACT

The limited jurisdiction of a court to review the NRAB's award is set forth in Section 3 First (q) of the Railway Labor Act, 45 U.S.C. §153 First (q), which section, as here pertinent, provides in part:

"....On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine it-self, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order." (Emphasis supplied.)

The statute thus narrowly circumscribes a court's jurisdiction to review. It is settled law that there can be no review of a decision or award of the NRAB except in the circumstances enumerated in Section 153(q).

Andrews v. Louisville & Nashville RR,  
406 U.S. 320, 325 (1972) - dictum;

Brotherhood of Rail. Train. v. Central  
of Ga. Ry. Co., 415 F. 2d 403 (5th  
Cir. 1969);

Edwards v. St. Louis-San Francisco RR Co.  
361 F. 2d 946 (7th Cir. 1966);

Kemp v. A., T. & S.F. Ry. Co., 358 F. 2d  
722 (5th Cir. 1966);

Johnston v. Interstate Railroad, 345 F.  
Supp. 1082 (W.D. Va. 1972);

McDonald v. Penn Central Transportation Co.  
337 F. Supp. 803 (D.C. Mass. 1972).

Decisions cited by Skidmore are either not in point or overruled by later decisions or decided before the 1966 amendments to the Railway Labor Act making decisions of the NRAB "conclusive" rather than "prima facie evidence" in sub-paragraph (p) and deleting the exception as to money awards in sub-paragraph (m) which had stated that "awards shall be final and binding....except insofar as they shall contain a money award."

For example, there can be no review when the NRAB has jurisdiction, has confined itself to the scope of the matter before it, and no fraud or corruption was involved

on the part of a member of its division. Southern Pacific Company v. Wilson, 378 F. 2d 533 (5th Cir. 1967), supra; Barrett v. Manufacturers Railway Company et al, 326 F. Supp. 639 (E.D. Mo. 1971) a. 453 F. 2d 1305, supra. Review of an award of the NRAB is ordinarily limited to a determination of the question whether the Board acted outside the scope of its authority and may not consider the merits of the award unless wholly baseless and completely without reason. Spade v. Chesapeake and Ohio Railway Co., 325 F. Supp. 1079 (D.C. Md. 1971). Since review under Section 153(q) is limited to the grounds stated, claims other than jurisdictional claims are not subject to judicial review. So also, the amount of an award is final, absent a jurisdictional defect. The measure of damages does not offer a jurisdictional defect. Brotherhood of Rail. Train. v. Denver and R.G.W. R. Co., 370 F. 2d 833 (10th Cir. 1966), supra. It has also been held that even if the NRAB committed error in reaching its decision, its award is conclusive on the parties and not subject to review. Brotherhood of Rail. Signal. v. Chicago, M., St. P. and P. R. Co., 444 F. 2d 1270 (7th Cir. 1971).

No facts were pleaded or proved by Skidmore to show that the awards in the cases at bar are invalid for any of

the reasons specified in Section 153(q). There was substantial evidence to support the awards. No claim is made that the NRAB lacked jurisdiction, that it did not comply with the provisions of the Railway Labor Act, that it did not confine itself to the issues before it, or that there was any corruption or fraud on the part of a member of the division of the NRAB involved. Mere conclusory allegations in pleadings without supporting facts are insufficient to make out a prima facie case. Curtis v. Everette, 489 F. 2d 516 (3rd Cir. 1973); Albany Welfare Rights Org. Day Care Ctr. v. Schreck, 463 F. 2d 620 (2d Cir. 1972). This is particularly true where, as here, allegations of fraud are made. Segal v. Gordon, 467 F. 2d 602 (2d Cir. 1972).

The mere claim by Skidmore that his rights under existing agreements have been violated does not confer jurisdiction in this court to review a decision of the NRAB, whose primary function is to pass upon such disputes.

Quite aside from the merits of Skidmore's contentions, it is clear that his claims should have been referred to the Arbitration Committee set up under the Merger Protection Agreement, cf. Brotherhood of Rail. Train. v. Chicago R. & I. R. Co., 353 U.S. 30 (1957),

and that the claim as to pass privileges has been beyond the Trustees' powers to remedy ever since Amtrak assumed responsibility for the operation of the Trustees' inter-city passenger trains and for the establishment of employee pass policies, and has been moot ever since Amtrak liberalized its original pass policies.

As to the gratuitous nature of passes, see Charleston & Western Carolina Ry. Co. v. Thompson, 234 U.S. 576, 577-8 (1914) and Francis v. Southern Pacific Co., 333 U.S. 445, 448-50 (1948).

CONCLUSION

The order of the trial court dismissing the two complaints should be affirmed.

Respectfully submitted,

*Robert M. Peet*

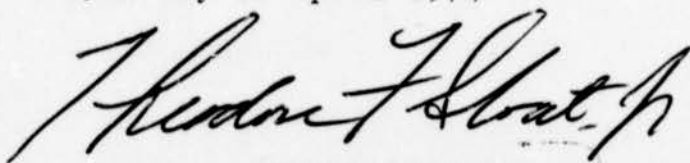
ROBERT M. PEET  
Attorney for Intervening  
Defendants-Appellees  
Office & P.O. Address  
466 Lexington Avenue  
New York, New York 10017  
Tel. No. 340-2504

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) S.S.:

Mary T. Maiellaro being duly sworn, says, that she resides in Westchester County; that she is upwards of the age of eighteen years, and is employed in the office of Robert M. Peet, the attorney for the Intervening Defendants-Appellees in the foregoing action; that on the 29th day of April 1974 she served upon H. G. Skidmore, the attorney for the Plaintiff-Appellant herein, the annexed Brief for Intervening Defendants-Appellees, by depositing a copy thereof, properly endorsed in a post-paid wrapper, in United States Post Office mailbox at entrance to 466 Lexington Avenue, Borough of Manhattan, New York, New York 10017, addressed to said attorney at 95-18 Baldwin Avenue, Forest Hills, New York 11375.

Sworn to before me this  
29th day of April 1974

  
Mary T. Maiellaro



THEODORE F. SLOAT, Jr.  
NOTARY PUBLIC, State of New York  
No. 60-3707100  
Qualified in Westchester County  
Cert. filed with N. Y. Co. Clk.  
Term Expires March 30, 1975